1969

Betty anderson, and David Patrick Alumbaugh Aka David Patrick anderson, His Guardian Ad Litem v. Parson Red-E-Mix Paving Company, Inc., A Utah Corporation, and Max E. Green, Et Al : Appellant's Brief

TABLE OF CONTENTS & INDEX

STATUTES CITED

CASES CITED

DISPOSITION IN LOWER COURT

This is an appeal by the Plaintiffs from the judgement of the court entered pursuant to a motion by the Defendants for a non-suit after the case had been called and jury selected, and after some of the Plaintiffs' witnesses had been called and heard and other certain offers of proof were made by Plaintiffs. The court granting said motion and entering judgement for the Defendants dismissing the action with prejudice and awarding the Defendants their costs of court on the following grounds:

a. The evidence including the proffered additional proof was found insufficient to show Defendants were negligent;

b. The evidence including the proffered additional proof shows the sole proximate cause of the collision was the negligence of Kim Mortenson, the driver of the vehicle in which the Plaintiff, David Patrick Alumbaugh, was riding from which judgment Plaintiffs now appeal.

IN THE SUPREME COURT OF THE STATE OF UTAH

BETTY ANDERSON, and DAVID PATRICK ALUMBAUGH aka DAVID PATRICK ANDERSON, his Guardian Ad Litem,
Plaintiffs and Appelants,

vs.

PARSON RED-E-MIX PAVING COMPANY, INC., a Utah Corporation, and MAX E. GREEN, et al,
Defendants and Respondents.

BRIEF OF APPELLANTS
Civil Case No. 10, 502

APPELLANTS BRIEF

STATEMENT OF FACTS

On April 22, 1966 the Defendant, Max Green, acting in his capacity as an employee of Parson Red-E-Mix Paving Company, Inc. delivered a load of ready mix concrete to the Phillips 66 Service Station located at 4th North and Main Street in Brigham City, Utah. Immediately following the delivery, he left the exten-

sion chutes extending to the rear and proceeded on to 4th North Street just West of the Phillips 66 Service Station and parked at a point where the asphalt surface of the road narrows, which location is about 150 feet West of the West curb line of the Main Street intersection and 4th North. Said Vehicle was parked with both its left rear duals on the oiled surface of the road (R 186). The area immediately to the North of where the truck parked was open and unused (Defendant's Exhibit 4) and is generally used for the purpose of parking heavy equipment and trucks. This area was open and available on the the date in question (R 48& 49). Said Defendant, Max Green, then proceeded to get out of his truck and climb to the platform at the rear of the mixer and began rinsing out the excess cement in the chutes. The chutes projected directly East and extended beyond the main body of the truck 9 feet 3 inches (R 255). There were no warning devices or red flags handing from the end of the chute. The time was approximately 4:30 P.M. and the sun was setting in the West. The oiled surface of the road was 27 feet wide at the location where the truck was parked (R 108), however this created a false impression, because just a few feet to the rear of the truck at the West edge of the Service Station property the entire width of the right of way was hard surfaced and wider making the entire right of way hard surface and usable for travel from the truck to the Main Street intersection, except for a few feet behind the truck. The truck was thus located at the time of the collision in question.

The Plaintiff, a fifteen (15) year old boy, was a rear seat passenger in a vehicle driven by one, Kim Mortenson. There was also another passenger named

Mark Herbert who was riding in the right front seat. Immediately prior to the accident, the Mortenson Vehicle had proceeded North Along Main Street from 2nd South to the 4th North and Main Street intersection in a normal and uneventful manner. At 4th North, the Mortenson vehicle pulled into the left hand storage and left turn lane in preparation to make a left hand turn. He then stopped and waited for traffic coming from the North to clear the intersection. Mortenson had just started into a left hand turn when Mark Herbert warned the driver to accelerate in order to avoid collision with a vehicle which Mortenson had failed to see coming from the North. In response to the warning, Mortenson over-accelerated and the car began to slide on some loose material on the road surface. While he was thus proceeding West with the rearend in a sideways slide and approximately 50 feet West of the curb line, he first noticed the Defendant's truck parked on the roadway. The driver at that point had sufficiently regained control and he thought that he could avoid collision by proceeding to the southwest and around the left side of the truck, but he failed to observe the steel chute extending to the rear (R 219 & 220) and although he was not sliding he collided with the extended chutes, which chutes penatrated the right hand side of the vehicle and into the rear seat (Defendant's Exhibit 9) where the Plaintiff was riding as a passanger. As a direct result of the chutes entering the rear seat area, the Plaintiff received serious and permanent injuries, the extent of which are not a part of this appeal.

POINT # 1

The court erred in holding Plaintiffs evidence failed

to show negligence on the part of Defendants. The evidence of the Plaintiff showed that the Defendant, Max Green, was negligent in the following respects:

1. That he parked his truck with the left hand side onto the traveled portion and the hard surfaced area of the street at a location where such parking was prohibited by Section 41-6-101, Utah Code, providing as follows:

> "Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway.
>
> This section shall not apply to the driver of any vehicle which is disabled while on the paved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."

The area was neither being used for residential or commercial, nevertheless, said property had been zoned commercial and abutting there to residential. It is Plaintiffs position that the actual conditions of the use

of the property should be controlling rather than the availability created by a zoning statute. The adjoining property in this case was a vacant lot graveled and used to park equipment. In a similar case Hillyard vs. Utah By-Products Co., 1U (2d) 143, 263 P. 2d 287, the statute was applied as to availability to park off the road.

In the case of Hillyard vs. Utah By-Products the factual situation was that the Defendant had partially driven his vehicle into a private driveway and the Court determined that where the space was available he had a duty to drive so that his entire vehicle was off the road. This case apparently in applying the statutory provision took into consideration the availability of an area in which to pull the truck entirely off the road rather than applying the narrow construction, as there was a single residence that they were in fact in a residential area which would allow for parking on the travel portion, however the court held it did apply based on availability of space off the roadway to park.

In this case on appeal there was not only a driveway available but an entire graveled lot and further there was no real need to stop at this location as the Defendant's own testimony is: "(R41) That it was a 10 minute drive from the location to the Parson Red-E-Mix yards where equipment was available to take care of clean up and to dispose of any excess materials he may have had."

139 P 2d 76 Takako et al vs. Ede et al

In that Ede case the defendant had failed to pull completely into a parking place at the side of a snow packed

road. The rear end of the car extended some 5 feet out of the parking area into the traveled portion of the road. Another vehicle had been sliding out of control for a distance of 90 feet and was still out of control when it collided with the defendant's vehicle. The plaintiff was a pedestrian standing at the other side of the parked vehicle and was injured as a result of the collision, driving the defendants vehicle into her.

"The appellant argues that the efficient and proximate cause of the accident was the skidding of the Ede car. It is quite true that had not the Ede car gone out of control it probably would not have struck appellant's car. Nevertheless, as in the case of Pastene v. Adams, 49 Cal. 87, the negligent piling of the lumber in the street did not cause the truck to be driven against it, thereby toppling over and injuring the plaintiff, but the court in that instance held that piling lumber in such a fashion was concurring negligence in that it concurred with the negligence of the driver of the truck and the judgement against the defendant was sustained. This court cannot say that the situation here presented is at all different than that in the Pastene case. In the present case the alleged negligent parking by appellant was a question of fact and was found by the jury to be a continuing negligence and a violation of the Motor Vehicle Code, St. 1935, p. 93, and therefore was a concurring negligence with that of the defendant Ede."

The Court erred in holding that Section 41-6-101 was not applicable in this case for the erroneous reason that the area was commercial or residential, and not the actual facts existing, which were the said property was not being used for either commercial or residential

purposes even though the Brigham City zoning ordinance makes the area available for that type of development. The lower court failed to take into consideration the availability of off street parking which in the instant case shows an open graveled yard on the north side (Defendant's Exhibit 4 - photo of open parking area) and vacant lots on the other side. The above was the condition of the entire distance from Main Street to First West, except for the property East of where the collision occurred where there was a service station on the one corner.

It is the Plaintiff's position that such an interpretation would do away with the basic purpose of the statute in that the general public traveling on the road would not be apprised except by the actual surrounding conditions. It seems clear in giving the particular statute in question this interpretation will lend itself to the purpose for the passing of all traffic regulations, that is, the safety and convenience of the general public in the use of the roads. It therfore follows that the actual existing conditions must be taken into consideration and not merely the passing of a zoning ordinance which can at best make certain property available for commercial and residential development. The controlling factor should be, was it being used for residential or commercial purposes at the time in question? The record makes it quite clear that it was not, and therefore the Plaintiff's contention is that Section 41-6-101 applies in the above entitled case and that the Defendant was in violation of said section.

The affirmative evidence shows that the adjoining property was available for parking and that the immed-

iate area was not being used for commercial nor residential purposes. In addition to being in violation of the above section, the defendants parking in the above location was dangerous and negligent because of its proximity with the Main Street intersection. It was forseeable that vehicles would come off a busy Main Street intersection at such speeds that the parking of the truck in this location would create an unreasonable hazard. Additional facts that should have been considered by a reasonable and prudent person was that at the given time of day, to wit: 4:30 p.m., the setting sun caused interference with the normal vision of drivers and further that because of the increased width of the hard surfaced road immediately to the rear, drivers coming from Main Street would have the impression that there was more roadway available than in fact there was.

Without reference to the statutory violation - Hillyard Case, 263 Pacific 287 290, -

> "The parking of a vehicle upon the paved or travel portion of a highway is generally regarded as a hazard to traffic thereon."

Therefore it was only proper for the jury to determine if there was an emergency justifing defendants parking in the location in question. The evidence showed no pressing need to park in this location. The availability of adjoining space on which parking could be made was not controlled by the zoning ordinance and did not change the actual use of the property. It was neither commercial nor residential and therefore the statutory provisions should be applied.

2. Violation of Brigham City Ordinance 256 Sec-

tion 136 which provides as follows:

> "No person shall drive any vehicle with a load or object upon such vehicle extending four feet or more beyond the bed or body of said vehicle without having during daytime a red flag at least 16 inches square attached at the extreme rear end of the load or object so protruding, and so hung that the entire area is visible to the driver of a vehicle approaching from the rear . . . "

The evidence shows that the cement chute extended 9 feet 3 inches, the ordinance provides that any extension over 4 feet from the body of the truck should have a red flag 16 inches square for the purpose of giving warning to vehicles approaching from the rear. In this case there were no flags. The only material difference in the Brigham City Ordinance and the State Code on this subject is that the Brigham City ordinance provides for the projection to be an object or a portion of the load while Section 41-6-128 provides for the extension of the load.

Utah Code Annotated 1953 Section 41-6-128 which provides as follows:

> "Whenever the load upon any vehicle extends to the rear four feet or more beyond the bed or body of such vehicle there shall be displayed a the extreme rear end of the load, at the times specified in section 41-6-118 hereof, a red light or lantern plainly visible from a distance of at least 500 feet to the sides and rear. The red light or lantern required under this section shall be in addition to the red rear light required upon every vehicle.

> At any other time there shall be displayed at the extreme rear end of such load a red flag or cloth not less than 12 inches square, and so hung that the entire area is visible to the driver of a vehicle approaching from the rear."

It seems apparent that the legislature in passing this particular section was aware of the dangerous condition created by projecting objects and that motorists would, unless special warning devices were placed on them, fail to observe them and therefore the situation which existed here was the actual situation foreseen by the legislature, and therefore the ordinance and State Code section should be applied in determining the negligence of the Defendant.

The Court erred further in holding that provision Utah Code Ann. Section 41-6-128 was not applicable to the Defendant for the following reason:

That the undisputed evidence shows that the entire truck was parked within the right of way of the road. That the extension of the chutes was stipulated to be 9 feet 3 inches from the main body of the truck (R225). Further, that the chutes when in position for traveling and folded up did not extend beyond the body of the truck but when unfolded and extended as they were in this case, extended 9 feet 3 inches to the rear. The Brigham City ordinance and the State Code provides that any extension beyond 4 feet requires a red flag not less than 12 and 16 inches square be hung so that the entire area is visible to a driver approaching from the rear. In this case there was no red flag at the end of the chute and the evidence shows that the direct

cause of the Plaintiff's injuries was the entry of the chute into the rear portion of the vehicle, the area in which the Plaintiff was riding as a guest passenger.

POINT II

PROXIMATE CAUSE

THE COURT ERRED IN HOLDING THAT THE SOLE PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES WAS THE NEGLIGENCE OF KIM MORTENSON, THE DRIVER, OF THE VEHICLE IN WHICH THE PLAINTIFF WAS RIDING. It was stipulated by the Defendant for the purpose of his motion that the facts showed a lack of contributory negligence on the part of the Plaintiff and therefore it is not argued in this brief. It is admitted that there was negligence on the part of Kim Mortenson that concurred with the negligence of the Defendant in causing the injuries, but that except for the concurring negligence of the Defendant there would have been no collision.

As relates to the proximate cause of the above collision Kim Mortenson testified (R 230) that he did see the truck prior to the collision, that in his opinion he had regained sufficient control that he would be able to avoid the collision, but denies that he ever observed the extended chute prior to the colliding with it.

65 C. J. S. Negligence Section 19 (c) P 418-420 states as follows:

"The generally accepted view is that violation of a statutory duty constitutes negligence, negligence as a matter of law, or, according to the decisions on the question, negligence per se, for the reason that non-

observance of what the legislature has prescribed as a suitable precaution is failure to observe that care which an ordinarily prudent man would observe, and, when the state regards certain acts as so liable to injure others as to justify their absolute prohibition, doing the forbidden act is a breach of duty with respect to those who may be injured thereby; or, as it has been otherwise expressed, when the standard of care is fixed by law, failure to conform to such standard is negligence. According to this view it is immaterial, where a statute has been violated, whether the act or omission constituting such violation would have been regarded as negligence in the absence of any statute on the subject or whether there was, as a matter of fact, any reason to anticipate that injury would result from such violation."

In addition to the above being in violation for the statutory prohibition of allowing the extension out, there were additional reasons why the allowing of the extension was hazardous which are as follows:

1. That because of the proximity of the truck to the corner, cars which could be expected to make the turnoff from Main Street on to 4th North would only have a short distance in which to make their observation thereby making it more probable that drivers would fail to see the extended chutes. Also because of the time of day and the setting of the sun, the chutes location would be within the location of the shadow cast by the truck itself and the sun would be shining into the eyes of the drivers coming from the East, all of which factors were apparent to any prudent person making reasonable observations.

For the above reasons the court committed an error

in finding that the Plaintiff's evidence was void of any facts upon which a reasonable person could find that the Defendant was guilty of negligence.

CONCLUSION

In final conclusion the evidence taken in the light most favorable to the plaintiff shows that:

1. There was evidence on which the jury could have reasonably concluded that the acts of the defendant constituted negligence. That said acts of negligence were a concurring and contributing cause without which the injuries to the plaintiff would not have occurred and therefore the court erred in taking this question from the jury.

2. That there was sufficient evidence that the acts of negligence of Kim Mortenson, although contributing to the injuries of the plaintiff, in and of themselves, would not have caused the injury to the plaintiff and therefore the court erred in finding that said negligence was the sole proximate cause as a matter of law, and therfore plaintiff prays that the judgement of the court be set aside and the matter be returned to the District Court and a new trial ordered and that the appellent be awarded costs on appeal.

Respectfully submitted,

Dale M. Dorius, Esq.,
Attorney for Plaintiffs
and Appellants